

A **AMFINANCE BHD**

v.

ULTIMATE EIGHT SDN BHD & ORS

B COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: A-02-1182-2010]
C 1 AUGUST 2013

D **HIRE PURCHASE:** *Hire purchase agreement - Revised agreements - Second set of documents signed in escrow - Whether hirer allowed financier to utilise second set of documents - Second set of documents dated unilaterally by financier - Whether done in bad faith - Whether hirer accepted balance sum without objection - Whether hire purchase agreement valid and enforceable*

E **HIRE PURCHASE:** *Breach of agreement - Default in payment - Variation of interest charges - Whether stated in letter of offer - Whether relevant notices given to hirer - Whether terms and conditions duly accepted by hirer*

F **HIRE PURCHASE:** *Repossession - Whether lawful - Whether financier obligated under contract to repossess equipment under hire - Whether hirer liable to deliver equipment upon default of payment*

G The appellant's claim against the first respondent was premised on a hire purchase agreement ('HP agreement') dated 23 January 1998 entered between the appellant as the owner and the first respondent as the hirer of a specified set of printing equipment ('the equipment'). The second, third and fifth respondents had guaranteed the due performance and observance of the HP agreement in two joint and several letters of guarantee and indemnity. The appellant's case was that the first respondent had
H failed to pay the overdue and outstanding monthly rentals and, in breach of cl. 6 of the HP agreement, had failed to return the equipment to the appellant and denied the appellant the right to repossess the equipment. The first respondent, in its defence, contended that: (i) the appellant had informed the first respondent
I that the first set of documents would not be utilised as the

documents were attested to by an officer of the appellant company who was under investigation and hence, requested the respondents to execute a fresh set of documents ('the second set of documents'); (ii) the appellant, without the consent of the respondents, had unilaterally dated the second set of documents as 23 January 1998 although the documents were said to have been signed by the respondents on 5 December 1997; (iii) the letter of credit was established on 23 January 1998; (iv) the delay in establishing the letter of credit had caused prejudice to the first respondent and was a material breach of the HP agreement resulting in loss and damage suffered by the first respondent; and (v) the appellant was informed by the first respondent that the directors of the first respondent would no longer be bound by their two letters of guarantee and indemnity. The High Court Judge held that the appellant had failed to prove its case on a balance of probabilities and dismissed the appellant's claim against the respondents. Hence, this appeal. The main issues that arose for consideration were: (i) whether there was a valid and enforceable HP agreement between the appellant and the first respondent; (ii) whether the appellant was at liberty to vary the interest charges; (iii) whether the appellant was in breach of the HP agreement; (iv) whether there was a valid letter of credit established by the appellant in favour of the first respondent; (v) whether the two letters of guarantee and indemnity provided by the second, third and fifth respondents were valid and enforceable; (vi) whether the second, third and fifth respondents had been validly discharged as guarantors; and (vii) the admissibility of statements of balance payable ('the exhibits').

Held (allowing appeal with costs):

Per Mah Weng Kwai JCA delivering the judgment of the court:

- (1) The respondents had returned the second set of documents duly signed in escrow to the appellant without any query or reservation whatsoever. Further, as the respondents had signed the documents in escrow, this impliedly meant that they were quite happy to let the appellant utilise this set of documents and to insert the date to complete the transaction. The respondents were requested to re-sign the documents as the first set of the documents was not being utilised. It would appear that the appellant had dated the second set of

- A documents on 23 January 1998 not out of “bad faith” but because the letter of credit was only established on that date and that the loan sum was disbursed on the same day. (para 42)
- B (2) The respondents had expressly admitted to signing the second set of documents in the Statement of Agreed Facts. It will be unconscionable on the part of the first respondent, having had the full benefit of the loan sum, to now deny liability merely because the appellant had unilaterally dated the second set of documents on 23 January 1998 and not 5 December 1997.
- C The truth of the matter is that the first respondent would not have obtained possession of the equipment if not for the loan facility granted by the appellant. Furthermore, the first respondent had accepted the balance sum from the appellant without any objections. Therefore, there was a valid and enforceable HP agreement entered into between the appellant and the first respondent. (paras 46, 47 & 51)
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- E (3) Pursuant to cl. 28 of the terms and conditions in the letter of offer, the appellant had reserved the right to vary or change the terms of the offer for the undrawn portion as at the date of such notice of variation or change. Notice of the relevant increases had been given by the appellant to the first respondent. The amended terms and conditions were accepted by the first respondent as it had signed in acknowledgement on the said letter. (para 52)
- F
- G (4) Clause 5(a) of the HP agreement provides that it was incumbent upon the first respondent to deliver the equipment upon its default of payment and there was no contractual duty imposed on the appellant to enter the premises of the first respondent to repossess the equipment. Notwithstanding that, the appellant did attempt to repossess the equipment from the first respondent’s premises but was without success as the appellant was denied entry. There was no breach of this requirement by the appellant. Further, no adverse inference should be invoked against the appellant for not calling the two repossessors, although their names were mentioned. (paras 54-56)
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- (5) The letter of credit could not be doubted or challenged as the disbursement of the loan sum could only be effected after the letter of credit had been established. Although the respondents may have valid ground to complain against the appellant for having delayed the establishment of the letter of credit, thereby delaying the business operations of the first respondent and resulting in alleged losses suffered, the first respondent had not claimed for its losses by way of a set off or counterclaim. The first respondent could not deny its liability to repay the appellant for money had and received without having properly pleaded its case by way of a set off and counterclaim merely on the ground that there was a delay on the part of the appellant in establishing the letter of credit. The first respondent was thus liable under the terms of the letter of credit. (paras 57 & 58)
- (6) The two letters of guarantee and indemnity were signed in escrow by the second, third and fifth respondents and were returned without qualification to the appellant. This impliedly meant that the second, third and fifth respondents knew or ought to have known that the two letters of guarantee and indemnity would be unilaterally dated by the appellant. There could be no issue of the two letters of guarantee and indemnity coming into effect before the letter of credit was established simply because the two letters of guarantee and indemnity and the letter of credit were similarly dated and thus became effective on the same day. (para 60)
- (7) The second, third and fifth respondents purported to revoke the letter of guarantee signed by them. However, the notice, which was written by the first respondent on behalf of the directors of the company, could not be effective as the notice was not given by the second, third and fifth respondents. Further, the letter of guarantee for the HP agreement, which was an indemnity as well as a guarantee, did not attract the provisions of s. 83 of the Contracts Act 1950 as s. 83 only applies to a continuing guarantee and not to a specific guarantee. The guarantee provided by the second, third and fifth respondents was a specific guarantee. Hence, the said respondents could not be relieved of their liability under the letter of guarantee in respect of the HP agreement. (paras 62-64)
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- A (8) The alleged non-compliance with s. 90A(4) of the Evidence
Act 1950 could not be an issue simply because when these
documents were tendered in the court as exhibits, no
objections were raised for the second, third and fifth
respondents. Further, the learned judge had in fact marked the
B documents as exhibits by consent and there was no valid
ground in law to exclude the documents from evidence. To
exclude it would cause injustice to the appellant as it will be
deprived of the opportunity of calling a witness to prove that
the computer that produced the exhibits was in good working
C order in the course of its ordinary use and in compliance with
s. 90A(2) and (4) of the Evidence Act. The respondents also
had failed to show what the actual figures should have been.
Hence, the exhibits were correctly admitted into evidence.
(paras 68, 69 & 72)

D ***Bahasa Malaysia Translation Of Headnotes***

- Tuntutan perayu terhadap responden pertama adalah berdasarkan
satu perjanjian sewa beli ('perjanjian HP') bertarikh 23 Januari
1998 yang dimasuki antara perayu sebagai pemilik dan responden
E pertama sebagai penyewa peralatan percetakan ('peralatan').
Responden-responen kedua, ketiga dan kelima telah memberi
jaminan pelaksanaan wajar dan pematuhan perjanjian HP dalam dua
gabungan dan beberapa surat gerenti dan tanggung rugi. Kes
perayu adalah bahawa responden pertama telah gagal membayar
F jumlah hutang sewa bulanan dan, dalam memungkirkan kl. 6
perjanjian HP, telah gagal memulangkan peralatan kepada perayu
dan menafikan hak pemilikan semula perayu terhadap peralatan
tersebut. Responden pertama, dalam pembelaannya, menghujahkan
G bahawa: (i) perayu telah memaklumkan responden pertama bahawa
set dokumen pertama tidak boleh digunakan memandangkan
dokumen-dokumen tersebut telah diakusaksikan oleh seorang
pegawai syarikat perayu yang sedang disiasat dan oleh itu,
memohon kepada responden-responen untuk menandatangani
dokumen-dokumen baru ('set dokumen kedua'); (ii) perayu, tanpa
H kebenaran responden-responen, telah, dengan sendirinya,
memasukkan tarikh 23 Januari 1998 bagi set dokumen kedua
walaupun dokumen-dokumen tersebut ditandatangani oleh
responden-responen pada 5 Disember 1997; (iii) surat kredit telah
dikeluarkan pada 23 Januari 1998; (iv) kelambatan mengeluarkan
I surat kredit telah menyebabkan prejudis kepada responden

pertama dan merupakan kemungkiran material perjanjian HP menyebabkan responden pertama mengalami kehilangan dan kerugian; dan (v) perayu dimaklumkan oleh responden pertama bahawa pengarah-pengarah responden pertama tidak lagi terikat kepada dua surat gerenti dan tanggung rugi tersebut. Hakim Mahkamah Tinggi memutuskan bahawa perayu telah gagal membuktikan kesnya atas imbalan kebarangkalian dan menolak tuntutan perayu terhadap responden-responen. Oleh itu, rayuan ini. Isu utama yang dibangkitkan untuk pertimbangan adalah: (i) sama ada terdapat perjanjian HP yang sah dan boleh dilaksanakan di antara perayu dan responden pertama; (ii) sama ada perayu mempunyai kebebasan untuk menukar kadar faedah; (iii) sama ada perayu memungkiri perjanjian HP; (iv) sama ada terdapat surat kredit yang sah dibuktikan oleh perayu berpihak kepada responden pertama; (v) sama ada dua surat gerenti dan tanggung rugi yang diberikan oleh responden-responen kedua, ketiga dan kelima adalah sah dan boleh dilaksanakan; (vi) sama ada responden-responen kedua, ketiga dan kelima telah dilepaskan dengan sah sebagai penjamin; dan (vii) kebolehterimaan penyata baki yang perlu dibayar ('ekshibit-ekshibit').

Diputuskan (membenarkan rayuan dengan kos)

Oleh Mah Weng Kwai HMR menyampaikan penghakiman mahkamah:

- (1) Responden-responen telah memulangkan set dokumen kedua yang telah ditandatangani dalam escrow kepada perayu tanpa sebarang pertanyaan atau keraguan. Tambahan, memandangkan responden-responen telah menandatangani dokumen dalam escrow, ini bermakna bahawa mereka telah membenarkan perayu untuk menggunakan set dokumen ini dan untuk memasukkan tarikh penyelesaian transaksi. Responden-responen diminta untuk menandatangani semula dokumen-dokumen itu memandangkan set dokumen kedua pada 23 Januari 1998 bukannya dibuat dengan niat buruk tetapi kerana surat kredit hanya dikeluarkan pada tarikh tersebut dan jumlah pinjaman dikeluarkan pada hari yang sama.
- (2) Responden-responen mengakui bahawa mereka telah menandatangani set dokumen kedua dalam penyata fakta-fakta yang dipersetujui. Adalah tidak berperikemanusiaan bagi responden pertama, setelah mempunyai faedah penuh jumlah pinjaman, untuk menafikan liabiliti hanya kerana perayu telah

- A memasukkan tarikh pada set dokumen kedua sebagai 23 Januari 1998 dan bukannya 5 Disember 1997. Hakikatnya adalah bahawa responden pertama tidak mungkin mendapat milikan peralatan tersebut jika bukan kerana kemudahan pinjaman yang diberikan oleh perayu. Tambahan, responden pertama telah menerima baki jumlah daripada perayu tanpa sebarang bantahan. Oleh itu, terdapat perjanjian HP yang sah dan boleh dilaksanakan.
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- (3) Berikutan kl. 28 terma dan syarat surat tawaran, perayu mempunyai hak untuk mengubah atau menukar terma-terma tawaran bagi bahagian yang tidak dikeluarkan pada tarikh notis perubahan atau penukaran sebegitu. Notis berkenaan peningkatan relevan telah pun diberi oleh perayu kepada responden pertama. Terma dan syarat yang dipinda telah diterima oleh responden pertama kerana ia telah mengakui penerimaan surat tersebut.
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- (4) Klausula 5(a) perjanjian HP memperuntukkan bahawa adalah tanggungjawab responden pertama untuk menghantar peralatan atas kegagalan membayar dan tiada tanggungjawab kontrak dikenakan pada perayu untuk memasuki premis responden pertama untuk mengambil kembali peralatan itu. Walau bagaimanapun, perayu telah cuba untuk mengambil kembali peralatan daripada premis responden pertama tetapi tidak berjaya kerana perayu dihalang daripada masuk. Tiada kemungkiran kehendak ini oleh perayu. Tambahan, tiada anggapan bertentangan yang sepatutnya dibangkitkan terhadap perayu atas kegagalan memanggil dua penarik peralatan, walau pun nama mereka dinyatakan.
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- G (5) Surat kredit tidak boleh disyaki atau dicabar memandangkan pengeluaran jumlah pinjaman hanya boleh dibuat selepas surat kredit dikeluarkan. Walaupun responden-responden mempunyai alasan sah untuk mengadu terhadap perayu bagi kelewatan mengeluarkan surat kredit, dengan itu melewati operasi perniagaan responden pertama dan menyebabkan kerugian yang dialami, responden pertama tidak menuntut kerugiannya dengan cara “set off” atau tuntutan balas. Responden pertama tidak boleh menafikan tanggungjawabnya untuk membayar semula perayu bagi wang yang disimpan dan diterima tanpa memplidkan kesnya dengan cara “set off” atau tuntutan balas
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- atas alasan bahawa terdapat kelewatan pada pihak perayu untuk mengeluarkan surat kredit. Oleh itu, responden pertama bertanggungjawab di bawah terma-terma surat kredit. A
- (6) Kedua-dua surat gerenti dan tanggung rugi telah ditandatangani dalam escrow oleh responden-responden kedua, ketiga dan kelima dan dikembalikan kepada perayu tanpa bantahan. Ini secara tersirat bermakna bahawa responden-responden kedua, ketiga dan kelima sepatutnya mengetahui bahawa kedua-dua surat gerenti dan tanggung rugi itu akan diberikan tarikh oleh perayu. Tiada isu bahawa kedua-dua surat tersebut akan dilaksanakan sebelum surat kredit dikeluarkan kerana surat-surat tersebut dan surat kredit mempunyai tarikh yang sama dan boleh dilaksanakan pada hari yang sama. B C
- (7) Responden-responden kedua, ketiga dan kelima telah cuba untuk menarik balik surat gerenti yang ditandatangani oleh mereka. Walau bagaimanapun, notis itu, yang ditulis oleh responden pertama bagi pihak pengarah-pengarah syarikat, tidak boleh dilaksanakan memandangkan notis itu tidak diberikan oleh responden-responden kedua, ketiga dan kelima. Tambahan, surat gerenti bagi perjanjian HP, yang merupakan tanggung rugi dan juga gerenti, tidak menarik peruntukan s. 83 Akta Kontrak 1950 memandangkan s. 83 hanya terpakai kepada gerenti berterusan dan bukannya kepada gerenti spesifik. Gerenti yang dibekalkan oleh responden-responden kedua, ketiga dan kelima adalah gerenti spesifik. Oleh itu, responden-responden tersebut tidak boleh dilepaskan daripada tanggungjawab mereka di bawah surat gerenti berdasarkan perjanjian HP. D E F
- (8) Ketidakpatuhan s. 90A(4) Akta Keterangan 1950 yang didakwa tidak boleh dibangkitkan sebagai suatu isu semata-mata kerana apabila dokumen-dokumen tersebut dikemukakan di mahkamah sebagai ekshibit, tiada bantahan dibangkitkan bagi responden-responden kedua, ketiga dan kelima. Tambahan, yang arif hakim telah pun menandakan dokumen-dokumen itu sebagai ekshibit melalui persetujuan dan tiada alasan sah di sisi undang-undang untuk mengecualikan dokumen-dokumen tersebut daripada keterangan. Ia akan menyebabkan ketidakadilan kepada perayu jika dokumen-dokumen itu G H I

- A dikecualikan memandangkan perayu akan dihalang daripada peluang untuk memanggil seorang saksi untuk membuktikan bahawa komputer yang telah mengeluarkan ekshibit-ekshibit berada dalam keadaan baik dalam perjalanan penggunaannya yang biasa dan mematuhi s. 90A(2) dan (4) Akta Keterangan.
- B Responden-responden juga gagal untuk menunjukkan angka sepatutnya. Oleh itu, ekshibit-ekshibit telah diterima masuk dengan betul sebagai keterangan.

Case(s) referred to:

- C *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800 FC (*refd*)
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA (*refd*)
Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA (*refd*)
KPM Khidmat Sendirian Bhd v. Tey Kim Sue [1994] 3 CLJ 1 SC (*dist*)

Legislation referred to:

- D Contracts Act 1950, s. 83
Evidence Act 1950, ss. 62, 65, 90A(2), (4), 114(g)
- For the appellant - Hargopal Singh; M/s Hargopal Singh & Co*
For the 1st & 2nd respondents - Augustin Nicholson; M/s Augustin Nicholson & Assocs
- E *For the 3rd & 4th respondents - Fatin Hanum Abdul Hadi; FC*
[Appeal from High Court, Ipoh; Suit No: 22-113-1999]
Reported by Emm Zehra

F

JUDGMENT

Mah Weng Kwai JCA:

G The Appellant's Claim

[1] By its statement of claim, the appellant claimed for the following reliefs:

- H (a) an order for the delivery up of a specified set of printing equipment (the equipment) purchased under the hire purchase agreement by the first respondent and if the first respondent fails to do so within 14 days of the order, the appellant shall be entitled to enter upon the premises of the first respondent to seize and take possession of the equipment;

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- (b) damages for the wrongful detention of the equipment; A
- (c) arrears of monthly rentals from 25 April 1998 to 8 July 1998 in the sum of RM87,752 with contractual interest thereon at the rate of 15.24% amounting to RM1,520.28 as at 8 July 1998; B
- (d) balance of the hire purchase price in the sum of RM1,022,644.59 less the resale value of the equipment, if any;
- (e) rental for the equipment from 8 July 1998 up to the date of delivery of possession at RM27,584 per month; C
- (f) damages for breach of contract;
- (g) interest; and
- (h) costs. D

[2] The appellant's claim against the first respondent was premised on a hire purchase agreement dated 23 January 1998 entered into between the appellant as the owner and the first respondent as the hirer of the equipment. The hire purchase agreement was at all material times, not subject to the provisions of the Hire Purchase Act 1967. E

[3] The appellant's claim against the second, third and fourth respondents was based on two joint and several letters of guarantee and indemnity, both dated 23 January 1998, provided by the second, third and fourth respondents to guarantee the due performance and observance of each and every term and condition in the hire purchase agreement. The appellant had withdrawn its claim against the fourth respondent previously. F G

[4] The appellant agreed to let and the first respondent agreed to hire the said equipment for a period of 48 months which commenced from 23 January 1998 at the hire purchase price of RM2,486,160. H

[5] Apart from paying the initial payment of RM1,162,160 and rentals for the months of February and March 1998, the first respondent failed, neglected and/or refused to pay the rentals for the succeeding months. I

A [6] The appellant gave notice on 1 July 1998 to the first respondent stating that if the overdue and outstanding monthly rentals were not paid within seven days of the notice, the hire purchase agreement would be deemed repudiated by the first respondent. The first respondent failed to make any payment to
B the appellant.

[7] The appellant also issued notices of demand dated 16 July 1998 to the second, third and fourth respondents to pay the overdue and outstanding monthly rentals. In breach of their
C guarantee and indemnity, the second, third and fifth respondents failed and/or refused to pay the sum/s owing.

[8] The first respondent in breach of cl. 6 of the hire purchase agreement failed to return the equipment to the appellant and denied the appellant's right to repossess the same.
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The Respondents' Defence

[9] Prior to 24 July 1997, the first respondent had requested the appellant for a facility of RM1 million to help finance the purchase of the equipment.
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[10] The first respondent executed the hire purchase agreement and the second, third and fourth respondents executed the two letters of guarantee and indemnity. The hire purchase agreement and the two letters of guarantee and indemnity were signed on 30
F July 1997 at the appellant's office when the letter of offer was accepted by the first respondent (as per the evidence of SD2) (the first set of documents).

[11] On 27 November 1997 the first respondent requested the appellant to establish a letter of credit in favour of the Taiwanese manufacturers of the equipment.
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[12] At the request of the appellant, the first respondent paid the sum of RM7,490.65 on 4 December 1997 to the appellant being
H the commission payable for establishing the letter of credit.

[13] On 4 December 1997, the appellant informed the first respondent that the first set of documents would not be utilised as the documents were attested to by an officer of the appellant company who was under investigations (see para. 4(b) of the
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defence at rekod rayuan p. 72). The appellant then requested the first respondent and the guarantors to execute a fresh set of the hire purchase agreement and the two letters of guarantee and indemnity (the second set of documents). The second set of documents was returned duly executed to the appellant on 5 December 1997.

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[14] The appellant, without the consent of the first, second, third and fourth respondents, unilaterally dated the second set of documents as 23 January 1998 although the said documents were said to have been signed on the 5 December 1997.

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[15] The letter of credit was established on 23 January 1998 in favour of the Taiwanese manufacturer of the equipment.

[16] The appellant was informed by the first respondent by letter dated 22 December 1997, signed by the fourth respondent, that the directors of the first respondent would no longer be bound by their two letters of guarantee and indemnity.

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[17] The first respondent contended that as the letter of credit was established late by the appellant this had caused prejudice to the first respondent and was a material breach of the hire purchase agreement resulting in loss and damage suffered by the first respondent.

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[18] After the establishment of the letter of credit on 23 January 1998, the first respondent's account with the appellant was debited with the sum of RM1 million on 23 January 1998. Of this sum of RM1 million a 'balance' sum of RM62,140 was paid to the first respondent on 4 March 1998.

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[19] The first respondent averred that as the appellant had failed to release the facility in accordance with the letter of offer dated 24 July 1997, the appellant was estopped from relying on the terms and conditions of the hire purchase agreement.

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[20] Further, the second, third and fourth respondents averred that as the appellant had failed to abide by the terms and conditions of the letter of offer, the appellant was precluded and estopped from relying on and enforcing the two letters of guarantee and indemnity.

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A [21] The first respondent contended that due to the delay in establishing the letter of credit, the first respondent had suffered a loss of an additional RM1 to the US Dollar due to the increased rate of foreign exchange, in the total sum of RM203,000.

B [22] On 14 October 1998, the first respondent through its solicitors, gave notice of its intention to terminate the hire purchase agreement and requested the appellant to refund the sum of RM1,162,160 to the first respondent.

Decision Of The High Court

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[23] After a full trial, the learned trial judge held that the appellant had failed to prove its case on a balance of probabilities and dismissed the appellant's claim against the respondents with costs.

D

Appeal By The Appellant

[24] Being dissatisfied with the decision of the learned judge, the appellant appealed to the Court of Appeal against the said decision.

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Decision Of This Court

F [25] Upon reading the record of appeal, the written submissions of counsel for the appellant and the respondents and upon hearing the oral submissions of counsel aforesaid, the court allowed the appeal with costs and set aside the order of the High Court.

[26] Being dissatisfied with the decision of the court, the respondents now apply for leave to appeal to the Federal Court.

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Grounds Of Decision

[27] In this appeal the following were the main issues to be determined by the court namely:

H (1) Whether there was a valid and enforceable hire purchase agreement entered into between the appellant and the first respondent and:

(a) whether the appellant was at liberty to vary the interest charges by increasing the rate from 2% to 3%;

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- (b) whether the appellant was in breach of the hire purchase agreement by not repossessing the equipment; A
- (2) Whether there was a valid letter of credit established by the appellant in favour of the first respondent;
- (3) Whether the two letters of guarantee and indemnity provided by the second, third and fourth respondents are valid and enforceable; B
- (4) Whether the second, third and fourth respondents have been validly discharged as guarantors in respect of the hire purchase agreement; and C
- (5) The admissibility of exhs. P25, P26 and P27.

Issue 1 - Whether There Was A Valid And Enforceable Hire Purchase Agreement Entered Into Between The Appellant And The First Respondent: D

[28] The appellant by its letter of offer dated 24 July 1997 (rekod rayuan p. 231) informed the first respondent that its application for a hire purchase facility had been approved, subject to the terms and conditions stipulated therein. The net amount financed was a maximum of RM1 million. Pursuant to cl. 14 of the letter of offer, the second, third and fourth respondents were required to provide a letter of guarantee in respect of the hire purchase facility granted to the first respondent. Further, pursuant to cl. 15(k)(i) in the event the appellant was to establish a letter of credit, the second, third and fourth respondents were required to execute a letter of guarantee and indemnity in favour of the appellant in respect of any losses that may be suffered in view of the opening of the letter of credit. E F G

[29] The respondents signed the first set of documents at the office of the appellant on 30 July 1997.

[30] About four months later, on 4 December 1997 (rekod rayuan p. 238) the appellant forwarded the second set of documents to the respondents for their re-execution and return together with the payment of RM7,490.65 being the commission payable for establishing the letter of credit as the appellant did not intend to utilise the first set of documents. H I

- A [31] On the next day 5 December 1997, the first respondent returned the second set of documents duly executed in escrow to the appellant.
- B [32] On 22 December 1997, the first respondent wrote to the appellant (rekod rayuan p. 266) requesting for the disbursement of the loan sum of RM1 million *albeit* “under protest without prejudice to our legal rights against your goodselves for breach of contract, nor does our acceptance of the same amount to any waiver of our rights”.
- C [33] The four copies of the hire purchase agreement in the second set of documents were duly signed by one Mr Tang, the branch manager of the appellant and witnessed by Karen Oh Su Su (PW1). The hire purchase agreement was dated 23 January 1998 by the appellant. (rekod rayuan p. 221).
- D [34] The signatures of the second, third and fourth respondents as guarantors under the letter of guarantee for the hire purchase agreement were witnessed by Karen Oh (PW1) and dated 23 January 1998 (rekod rayuan pp. 224 to 226).
- E [35] The letter of guarantee and indemnity in respect of the letter of credit jointly signed by the second to fourth respondents was also witnessed by Karen Oh (PW1) and similarly dated 23 January 1998.
- F [36] Following the completion of the hire purchase agreement by the appellant, the loan sum of RM1 million was disbursed and on the same day, that is, 23 January 1998, the first respondent requested the appellant to pay the “balance sum” from the RM1 million facility to them urgently once the letter of credit was
- G established (rekod rayuan p. 244).
- [37] Subsequently on 27 February 1998, the appellant forwarded its cheque for the sum of RM62,140 being the “balance refund sum” from the facility to the first respondent.
- H [38] Much was said by counsel for the respondents that the appellant had failed to utilise the first set of documents which had been duly signed by the first respondent and the second to the fifth respondents on or about 30 July 1997 at the appellant’s
- I office. In fact, the learned judge accepted the contention of

counsel and held in his judgment that “no genuine grounds were put forward by the plaintiff for not proceeding to enforce an earlier set of hire purchase agreement and letter of indemnity and guarantee signed by the defendants”, referring to the first set of documents.

[39] However, in our judgment we are of the view that the appellant had satisfactorily explained the reason why the first set of documents was not used. A perusal of the notes of evidence will show that Karen Oh (PW1) in her cross-examination (rekod rayuan p. 103) had explained to the court that her manager had instructed her to have the documents re-signed by the respondents as the employment of the “earlier officer who handled the case was terminated”. That was at the discretion of the appellant and there does not seem to be any misuse or abuse in the exercise of that discretion.

[40] Counsel for the respondents submitted that Mr Tang, the branch manager ought to have been called as a witness by the appellant. It is trite that not every person involved in a transaction need to be called as a witness. In this case, the important and material witness was PW1 as she was effectively the officer who had witnessed the respondents’ signatures. Mr Tang was merely present in his capacity as a manager.

[41] This court is not prepared to accept the finding of the learned judge that the evidence of PW1 was ‘unreliable, inconsistent and contradictory’ when she explained the need for the documents to be re-signed.

[42] The second set of documents was signed in escrow by the respondents and duly returned to the appellant on 5 December 1997. It will be noted that the respondents had returned the second set of documents duly signed in escrow to the appellant without any query or reservation whatsoever. The respondents merely complied with the request of the appellant without so much as asking as to why it was necessary to re-sign the documents. Further, as the respondents had signed the documents in escrow, this impliedly meant that they were quite happy to let the appellant utilise this set of documents and to insert the date to complete the transaction. It was this set of documents that was dated 23 January 1998 by the appellant. Thus it would appear

- A erroneous for the learned judge to hold that “the hire purchase agreement was signed sometime in November 1997 and was not completed. It was later unilaterally and with bad faith dated by the plaintiff on 23 January 1998”. Significantly, the second set of documents which was dated 23 January 1998 by the appellant was
- B only returned by the first respondent on 5 December 1997. Hence it could not have been the same set of documents said have been signed sometime in November 1997. As explained by PW1, as the first set of documents was not being utilised, the respondents were requested to re-sign the documents. It would appear that
- C the appellant had dated the second set of documents on 23 January 1998 not out of “bad faith” but because the letter of credit was only established on the 23 January 1998 and that the loan sum was disbursed on the same day.
- D [43] Thus, the court is of the view that the learned judge was in error when he held that the appellant had with bad faith inserted the date of 23 January 1998 “to overcome the situation of an unenforceable contract and to circumvent the unfair practices and consequently a situation of resulting in an unenforceable contract”
- E and that “the transactions and correspondences formed part and parcel of the first set of the hire purchase agreement and guarantee and indemnity documents entered between the parties”.
- F [44] The court is further of the view that there was no bad faith on the part of the appellant in dating the second set of documents on 23 January 1998 as the first respondent well knew that by its letter of 23 January 98 (rekod rayuan p. 244) the loan sum could only be disbursed after the letter of credit had been established.
- G [45] As a matter of fact, at all material times, the date of the second set of documents did not matter a jot to the respondents at all as they were only interested in the release of the loan sum.
- H [46] The respondents did not at any time deny the existence of the second set of documents nor their signatures thereon. What they have complained about is the unilateral dating of the second set of documents on 23 January 1998. However, the court is of the considered view that nothing turns on this as the respondents have expressly admitted to signing the second set of documents
- I in the statement of agreed facts. The first respondent has had the

full benefit of the loan sum and it will be unconscionable on its part to now deny liability merely because the appellant had unilaterally dated the second set of documents on 23 January 1998 and not on 5 December 1997, the date of the letter enclosing the documents returned by the first respondent to the appellant. The truth of the matter is that the first respondent would not have obtained possession of the equipment if not for the loan facility granted by the appellant.

[47] Furthermore, the first respondent had accepted the balance sum of RM62,140 from the appellant on 4 March 1998 without any objections.

[48] The court is of the view that the learned judge fell into error when he held that the hire purchase agreement and the two letters of guarantee were unenforceable merely because the appellant had unilaterally dated the second set of documents on 23 January 1998 and had utilised this set of documents instead of the first set of documents signed on 30 July 1997. At the end of the day, only one set of documents was relied on by the appellant to complete the hire purchase transaction and there was only one drawdown of the loan facility. It is not as though the respondents are also being held liable by the appellant under the first set of documents as well. Apart from the time difference of about six months, no prejudice has been caused to the respondents by the appellant dating the second set of documents on 23 January 1998. If the respondents had suffered any loss due to the (purported) delay, it was entirely up to them to plead a set off in defence and to raise a counter claim. The use of the second set of documents would not legally entitle the respondents to disclaim liability under the hire purchase agreement and the two letters of guarantee respectively, especially since the respondents have derived the full benefit of the loan facility.

[49] Counsel for the respondents also submitted that the appellant had failed to tender the first set of documents as exhibits and had also failed to adduce evidence to show that the first set of documents had been revoked.

[50] On this point, the court holds that there was no evidence adduced to suggest that the first set of documents had in fact and in law come into force and was binding on the appellant and the

- A respondents. As such there was no issue of having the first set of documents revoked as the same was not in use at all material times. It therefore follows that the non-production of the first set of documents as an exhibit was not a material omission.
- B [51] Accordingly, in our judgment we hold that there was a valid and enforceable hire purchase agreement entered into between the appellant and the first respondent. The court disagrees with the finding of the learned judge that “the cumulative effect of the plaintiff’s conduct on the set of facts tantamount to misrepresentation of the true facts which had resulted the defendants to act to their detriment as testified by the defendants”.
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Issue 1(a) - Whether The Appellant Was At Liberty To Vary The Interest Charges By Increasing The Rate From 2% To 3%

- D [52] The short answer to this point is in the affirmative as the appellant, pursuant to cl. 28 of the terms and conditions in the letter of offer dated 24 July 1997 had reserved the right to vary or change the terms of the offer for the undrawn portion as at the date of such notice of variation or change. And notice of the relevant increases had been given by the appellant to the first respondent (rekod rayuan p. 246). The amended terms and conditions were accepted by the first respondent as it had signed in acknowledgement on the said letter. The record also shows that the first respondent had paid rentals to the appellant at the revised rate.
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[53] In any event, as pointed out by counsel for the appellant, this was not one of the agreed issues to be tried.

- G *Issue 1(b) - Whether The Appellant Was In Breach Of The Hire Purchase Agreement By Not Repossessing The Equipment.*

- H [54] Clause 5(a) of the hire purchase agreement (rekod rayuan p. 222) provided that in the event the hirer “shall make default in punctually paying the initial payment or any of the hire rentals or any other sums payable under the agreement, ... the hirer shall forthwith at the hirer’s expense deliver up the said goods to the owner”. Thus it was incumbent upon the first respondent to deliver up the equipment upon its default of payment. There was no contractual duty imposed on the appellant to enter the premises of the first respondent to repossess the equipment.
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[55] However, notwithstanding the legal position as stated above, the appellant did on 5 October 1998 attempt to repossess the equipment from the first respondent's premises but without success as the appellant was denied entry. This attempt by the appellant drew a sharp rebuke from the solicitors acting for the first respondent by its letter dated 14 October 1998 (rekod rayuan p. 263). Needless to say, the solicitors were labouring under a serious mistake of law by insisting that the first respondent could exercise a lien or security over the equipment until the appellant had refunded the sum of RM1,162,160 being the loan sum and "the balance refund" to the first respondent!

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[56] The court is satisfied that there was no breach of this requirement by the appellant. Further the court is of the view that no adverse inference under s. 114(g) of the Evidence Act 1950 should be invoked against the Appellant for not calling the two reposseors, Lee Thim See and Gong Sim Cheong, in the circumstances, although their names had been mentioned by PW3.

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Issue 2 - Whether There Was A Valid Letter Of Credit Established By The Appellant In Favour Of The First Respondent

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[57] It was not disputed that the first respondent had paid the commission fees of RM7,490.65 to the appellant for the establishment of the letter of credit on 4 December 1997 and that the letter of credit was established on 23 January 1998. No doubt there may have been a slight delay on the part of the appellant in the establishment of the letter of credit but the validity of the letter of credit cannot be doubted or challenged at any time as the disbursement of the loan sum could only be effected after the letter of credit had been established. As at 23 January 1998, the first respondent had no objection at all to the letter of credit being established *albeit* belatedly, as the first respondent by its letter of 23 January 1998 had requested for the payment of the balance sum from the RM1 million facility urgently.

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[58] It would appear that the respondents may have a valid ground to complain against the appellant for having delayed the establishment of the letter of credit of about one and a half months (from 5 December 1997), thereby delaying the business operations of the first respondent and resulting in alleged losses suffered. It was not disputed that the first respondent did in fact

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- A suffer on additional expense of RM203,100 when securing the letter of credit due to the increase in the exchange rate between the Ringgit and the US Dollar in January 1998. Be that as it may, the first respondent has however not claimed for its losses by way of a set-off and counterclaim. With respect, the court is unable to
- B see just how the first respondent can deny its liability to repay the appellant for money had and received without having properly pleaded its case by way of a set-off and counterclaim merely on the ground that there was a delay on the part of the appellant in establishing the letter of credit. Accordingly, the court is of the
- C view that the first respondent is liable under the terms of the letter of credit.

Issue 3 - Whether The Two Letters Of Guarantee And Indemnity Provided By The Second, Third And Fourth Respondents Are Valid And Enforceable

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- E [59] As previously mentioned under issue 1, the second, third and fourth respondents were required under cls. 14 and 15 of the terms and conditions in the letter of offer to furnish the letter of guarantee in respect of the hire purchase agreement (rekod rayuan p. 224) and the letter of guarantee and indemnity in respect of the letter of credit (rekod rayuan p. 227) to the appellant respectively. This the second, third and fourth respondents did and the two letters of guarantee and indemnity were accepted by the appellant.
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- G [60] The two letters of guarantee and indemnity were signed in escrow by the second, third and fourth respondents and were returned without qualification to the appellant. This meant impliedly at the least, that the second, third and fourth
- H respondents knew or ought to have known that the two letters of guarantee and indemnity would be unilaterally dated by the appellant. There can be no issue of the two letters of guarantee and indemnity coming into effect before the letter of credit was established on 23 January 1998. This is simply because the two
- I letters of guarantee and indemnity and letter of credit were similarly dated on 23 January 1998 and thus became effective on the same day.

Issue 4 - Whether The Second, Third And Fourth Respondents Have Been Validly Discharged As Guarantors In Respect Of The Hire Purchase Agreement A

[61] The second, third and fourth respondents contended that they had signed the letter of guarantee on 5 December 1997 before the letter of guarantee together with the hire purchase agreement were returned undated to the appellant under cover of letter dated 5 December 1997 (rekod rayuan p. 267). As the letter of guarantee was only dated on 23 January 1998 by the appellant, the letter of guarantee cannot be said to be effective from 5 December 1997. The letter of guarantee only came into effect on 23 January 1998. As the letter of credit was also established on 23 January 1998 itself there can be no issue of the letter of guarantee being “unenforceable on the ground that the letter of credit cannot operate retrospectively” as was wrongly held by the learned judge. There was no issue of any retrospectivity in this case. B C D

[62] The second, third and fourth respondents purported to revoke the letter of guarantee signed by them on 5 December 1997 when on 22 December 1997, the first respondent wrote to the appellant (rekod rayuan p. 266) giving notice on behalf of the directors of the company that the letter of guarantee was no longer binding on them. This notice in our view cannot be effective as the purported notice was given by the first respondent and not by the second, third and fourth respondents personally. E F

[63] Be that as it may, the court is of the further and considered view that as the letter of guarantee for the hire purchase agreement, which is an indemnity as well as a guarantee, does not attract the provisions of s. 83 of the Contracts Act 1950 as s. 83 only applies to a continuing guarantee and not to a specific guarantee. The guarantee provided by the second, third and fourth respondents in this instance is a specific guarantee. Section 83 provides that a continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor. However in this case, the letter of guarantee in respect of the hire purchase agreement was a single and current transaction. G H

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- A [64] Hence, the second, third and fourth respondents cannot be relieved of their liability under the letter of guarantee in respect of the hire purchase agreement.

Issue 5 - Admissibility Of Exhs. P25, P26 And P27

- B [65] Counsel for the respondents submitted in his written submission that:

C SP3 had not tendered a single piece of evidence to prove that the computer was in good working order and was operating properly in all respects throughout the material part of the period during which P25, P26 and P27 were produced. Hence the requirements of s 90A(4) was not established and therefore P25, P26 and P27 are inadmissible as evidence of the facts stated therein without which the Appellant's claim fails as the Appellant's claim solely rested on P25 and P26.

- D [66] Pursuant to the statement of balance payable as at 8 July 1998 the total balance sum due from the first respondent was RM1,022,644.59. This document was admitted in evidence and was marked P26 by the learned judge. And pursuant to the
E statement of balance payable as at 10 July 2006, the total balance sum due and owing by the first respondent was RM2,438,545.48. This statement too was admitted in evidence and was marked as exh. P25.

- F [67] Surprisingly, in his submissions, counsel for the respondents contended that all these computer generated exhibits ought not to have been admitted in evidence by reason of the non-compliance with ss. 90A(2) and (4) of the Evidence Act 1950. Section 90A (2) and (4) of the Evidence Act 1950 provides:

G (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the
H document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

- I (4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

[68] The alleged non-compliance with s. 90A(4) cannot be an issue simply because when these documents were tendered in court as exhibits through PW3, Maathir binti Mohd Ghazali, counsel for the second, third and fourth respondents did not raise any objections thereto (rekod rayuan pp. 135 -137). Save to have the cross-examination of PW3 on the statements as to the accuracy of the amounts stated therein the cross-examination of PW3 did not detract from having the documents admitted in evidence. Further, the learned judge had in fact marked the documents as exhs. P25, P26 and 27 by consent and there is no valid ground in law to exclude the three documents from the evidence. To do so now would be to cause an injustice to the appellant as it will be deprived of the opportunity of calling a witness to prove that the computer that produced exhs. P25, P26 and P27 was in good working order in the course of its ordinary use and in compliance with ss. 90A(2) and (4) of the Evidence Act 1950. No certificate was needed to be produced by the appellant as there was no objection to the three documents being tendered as exhibits by counsel for the respondents.

[69] As for the veracity or accuracy of the figures stated in exhs. P25, P26 and P27, there is no reason for the court not to attach any weight to the evidence as the records were kept and the figures produced by the appellant in their ordinary course of business. Further s. 62 of the Evidence Act 1950 provides that documents produced by a computer are primary evidence. Besides, apart from the respondents criticising the inaccuracy or discrepancy of the contents in exhs. P25, P26 and P27, the respondents themselves have failed to show what the actual figures should have been. It was incumbent on the respondents to dispute the figures right from the time the first letter of demand was issued by the appellant.

[70] Counsel for the respondents also complained that the appellant had failed to produce the “files or record books” in support of exhs. P25, P26 and P27. The court is of the view that if the appellant was required to do so, this would have defeated the very purpose of the appellant producing the computer generated documents under s. 90A of the Evidence Act 1950 in the first place!

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A [71] In support of his argument that the maker of the summary of the accounts ought to have been called to prove the facts and particulars stated therein were correct and the basis of the calculation of the amount claimed, especially since the record books upon which the maker based the summary was not
B produced in evidence, counsel for the respondents cited the case of *KPM Khidmat Sendirian Berhad v. Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627 in support where His Lordship Mohamad Dzaiddin SCJ (as he then was) held that it was wrong in law to
C rely on a summary of accounts without calling the maker as a witness and that it was a well established rule of evidence that when documentary evidence is tendered, primary evidence of the said document must be adduced except in the cases under s. 65 of the Evidence Act 1950. However, we are of the view that this case can be easily distinguished and that it does not apply to the
D present case in that *KPM Khidmat Sendirian Berhad* was a case dealing with documents under s. 62 of the Evidence Act 1950 and not computer generated documents admissible under s. 90A of the Evidence Act 1950.

E [72] Accordingly, we are of the view that the three documents were correctly admitted into evidence. (See cases of *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613, *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6; [1997] 3 MLJ 1 and *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269; [2006] 4 MLJ 134).

F **Conclusion**

[73] In the result, the appeal was allowed with costs.

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